



July 28, 2006

VIA ELECTRONIC FILING AND E-MAIL (rodney.cluck@mms.gov)

Dr. Rodney E. Cluck
Minerals Management Service
U.S. Department of the Interior
381 Elden Street
Mail Stop 4042
Herndon, VA 20170

Re: Comments on the Notice of Intent to Prepare an EIS on the Cape Wind Project

Dear Dr. Cluck:

The National Trust for Historic Preservation appreciates the opportunity to provide comments regarding the proposal for development of the Cape Wind Energy Project (Cape Wind Project) in Nantucket Sound. Cape Wind seeks a permit to build 130 wind turbines in a 24-square-mile area that is 4.7 miles from the coast of Cape Cod, 5.4 miles from Martha's Vineyard, and 11.2 miles from the Island of Nantucket.

Although the National Trust supports efforts to create renewable energy, it is crucial for agencies and for the public to consider the effects of these projects on our nation's irreplaceable cultural resources in accordance with the National Historic Preservation Act and the National Environmental Policy Act. The proposed wind farm has the potential to adversely affect many historic properties surrounding the Nantucket Sound, as the Army Corps of Engineers earlier recognized. The National Trust urges the Minerals Management Service (MMS) to recognize the significance of this adverse impact and to develop and evaluate alternatives and modifications to the project that would avoid, minimize, and mitigate potential harm to cultural and historic properties.

Interests of the National Trust

The National Trust is a private nonprofit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 16 U.S.C. § 468. With the strong support of more than 250,000 members and supporters, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition to our headquarters in Washington, D.C., the National Trust operates 26 historic sites open to the public and eight regional and field offices throughout the country, including a Northeast Office in Boston.

Protecting the Irreplaceable



The National Trust has long been engaged in preservation issues within the Nantucket Sound region. For example, in 1994, we placed Cape Cod on our List of *11 Most Endangered Historic Places* to address the threat of incompatible development on the historic character of the Cape. And in 2000, we listed Nantucket among our *11 Most Endangered Historic Places* to publicize the increase in “teardowns” and “gut-rehabs” of historic homes, which also threatened the area’s historic character.

A. NATIONAL HISTORIC PRESERVATION ACT

1. Section 106 Requirements.

MMS must comply with Section 106 of the National Historic Preservation Act (NHPA) prior to deciding whether to approve the Cape Wind project. Section 106 requires federal agencies, “prior to” approving or funding a project, to “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register,” and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on the undertaking. 16 U.S.C. § 470f. The NHPA defines an “undertaking” to include a “project, activity, or program” requiring a Federal permit, license, or approval. *Id.* § 470w(7)(C); 36 C.F.R. § 800.16(y). It is undisputed that the Cape Wind Project constitutes an “undertaking” requiring compliance with Section 106 of the NHPA, because of the role of MMS in regulating and approving the project pursuant to the Energy Policy Act of 2005.

As required by the statute, the ACHP has promulgated regulations to establish mandatory procedural requirements for compliance with Section 106, which are binding on all federal agencies. *Id.* § 470s; *see* 36 C.F.R. Part 800. The Section 106 regulations require the MMS to take into account the effects of the Cape Wind project by: (1) making a “reasonable and good faith effort” to identify historic properties within a defined Area of Potential Effects (APE), 36 C.F.R. § 800.4(b)(1); (2) determining the eligibility of historic properties for the National Register, *id.* § 800.4(c); (3) assessing any effects the undertaking may have on historic properties, *id.* § 800.5; and (4) if the effects are adverse, developing and evaluating alternatives or modifications to the project to avoid, minimize, or mitigate those effects based on consultation with the State Historic Preservation Officer (SHPO), Indian tribes, the ACHP, and other consulting parties, *id.* § 800.6(a). The regulations encourage agencies to initiate the Section 106 process “early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.” *Id.* § 800.1(c).

MMS must closely consider the adverse effects of the Cape Wind project on many eligible and listed National Register properties. As the regulations state:

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in

the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.

Id. § 800.5(a)(1). Adverse effects include the “[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features....” Id. § 800.5(a)(2)(v) (emphasis added).

Many recent studies examining the effects of the Cape Wind project conclude that it would “significantly alter the historic Nantucket setting,” with visual and audible effects on numerous historic and cultural properties both surrounding the Nantucket Sound and in offshore areas. The Army Corps of Engineers also concluded that the project would adversely affect historic properties.

In deciding whether to approve the Cape Wind project, MMS should consider how the number of wind turbines, the size and appearance of the turbines, and their proximity to the shorelines surrounding the project would affect historic and cultural properties in the Area of Potential Effects (APE). Timely initiation of Section 106 consultation will ensure that MMS considers a broad range of alternatives as a means of avoiding, minimizing, or mitigating the likely adverse effects of the Cape Wind Project as proposed.

2. National Historic Landmarks are Afforded Additional Protection Under Section 110(f).

Federal agencies have an increased responsibility to preserve and protect National Historic Landmarks (NHLs), in accordance with Section 110(f) of the NHPA. Section 110(f) requires the responsible agency, “to the maximum extent possible, [to] undertake such planning and actions as may be necessary to minimize harm to such landmark, and . . . [to] afford the [ACHP] a reasonable opportunity to comment on the undertaking,” 16 U.S.C. § 470h-2(f). As currently proposed, the Cape Wind Project would adversely affect at least two NHLs – the Kennedy Compound NHL and Nantucket Island NHL. *See* Army Corps of Engineers, Cape Wind Project Draft EIS, *available at* <http://www.nae.usace.army.mil/projects/ma/ccwf/deis.htm> (last accessed July 27, 2006). The MMS’ summary of the project, however, does not explicitly recognize these two properties as potentially affected NHLs. MMS, Summary of the Project, *available at* <http://www.mms.gov/offshore/PDFs/CapeWindProjectPlanFiling.pdf>, p. 34-35 (last accessed July 27, 2006). MMS must take into account the higher level of significance and higher protection standard applicable to these two NHLs, prior to making a decision on the project.

3. The MMS Should Incorporate and Expand Upon the Information Gathered by the Army Corps of Engineers in the Draft EIS and Section 106 Process.

The National Trust encourages MMS to utilize the information regarding historic properties from the 2004 Army Corps of Engineers’ NEPA and Section 106 documents for the

Cape Wind Project. Correspondingly, we caution that MMS should not simply reissue or reiterate the Corps' DEIS; rather, MMS should take a harder look at the effects of the Cape Wind Project on historic properties. As part of its efforts to comply with Section 106, the Army Corps prepared a technical report defining the APE for the project and identifying the historic properties within the APE. *See* Corps' DEIS, Appendix 5.10-F. Although the Corps' technical report may be instructive, the Corps' APE may be too limited to capture all of the potentially affected historic properties, i.e., "open unobstructed views of the Project from onshore historic properties would generally only [be] available within approximately 300 feet of the shoreline in areas oriented toward the proposed Wind Park." *Id.* at 14. Because an agency usually evaluates only the historic properties within the defined APE, it is critical that the APE cover to the greatest extent the area likely to be directly and indirectly affected by the Cape Wind Project.

Additionally, in identifying and evaluating potentially affected historic properties, MMS should expand beyond the analysis provided in the Army Corps' technical report. The Corps' technical report concluded that the Preferred Alternative for the proposed Cape Wind Project would have adverse visual effects on "two NHL properties (Kennedy Compound and Nantucket Historic District), four historic districts, and 10 individual properties." *Id.* at 34-43; Corps' DEIS at 5-188. By contrast, MMS' initial summary of the project states that only 12 historic structures and districts listed on or eligible for the National Register will be potentially adversely affected by the Cape Wind Project. MMS, Summary of the Project at 34-35.

The Corps' technical report appears to identify and evaluate only those historic properties that have been "formally Determined Eligible for listing in the National Register by the Keeper of the National Register." Corps' DEIS, Appendix 5.10-F, at 19-20. This is inconsistent with the Section 106 regulations, which explicitly provide that "[t]he term *eligible for inclusion in the National Register* includes both properties formally determined as such . . . and all other properties that meet the National Register criteria." 36 C.F.R. § 800.16(l)(2) (emphasis in original). MMS must take reasonable and good faith steps to identify and evaluate all historic properties thoroughly, including, but not limited to, the 16 historic properties identified as adversely affected by the Corps.

Overall, the visual intrusion of the Cape Wind Project will be significant on historic properties, as the Army Corps concluded in its visual impact assessment— "[t]he interruption of the natural horizon line by the turbines and related structures will significantly alter the historic Nantucket Sound setting" for the adversely affected historic properties. Corps' DEIS, Appendix 5.10-F, at 38. The National Trust would like to ensure that MMS defines an appropriate APE to capture the visual adverse effects from all significant historic properties potentially affected. Not only will this instruct the Section 106 process, it will help to inform the NEPA process (discussed below), and ensure that MMS fully evaluates alternatives and modifications to the Cape Wind Project and advances, through consultation with the consulting parties, measures to "avoid, minimize or mitigate" the adverse effects.

4. General Concerns about Adverse Effects on Historic Properties.

It is important for MMS to recognize the potential for adverse impacts on properties not just on one shore, but on the shores of three different islands, all of which have many historic properties. The small Nantucket Sound is surrounded by these historic islands; most places on each of the islands are within the viewshed of the shores of the other islands themselves. The Cape Wind Project would include the construction of as many as 130 Wind Turbine Generators (WTGs) (each towering 417 feet) covering 24 square miles, which would take up 15% of the entire Nantucket Sound. The adverse impacts on the settings and viewsheds of the surrounding historic properties are simply unavoidable. The Corps' DEIS discusses this significant impact but does not adequately describe the adverse effect on all of the surrounding historic properties. The Sound is so small that it would be nearly impossible to avoid looking at the proposed turbines when standing on any island. Further, the noise from the turbines would create an adverse effect for both tourists and residents alike. At the very least, the WTGs would greatly affect the transportation to and from the islands, because the ferries to Martha's Vineyard and Nantucket would constantly be traveling past the turbines, and other boats would not be able to take their normal routes. All of these impacts were discussed in the Corps' DEIS, but the National Trust asks that MMS give adequate weight to the severity of the adverse impacts on the Nantucket Sound and surrounding islands. *See* Corp's DEIS, Appendix 5.10-F at 34-44.

5. National Trust's Request to Participate as a "Consulting Party".

On May 1, 2006, the National Trust submitted to MMS a letter formally requesting to participate as a "consulting party" in the Section 106 process for the Cape Wind Project in accordance with 36 C.F.R. § 800.3(f)(3). MMS has not yet responded to our request. As a member of the federal Advisory Council on Historic Preservation, the Trust has a unique role in the Section 106 process, 16 U.S.C. § 470i(a)(8), and our participation as a consulting party in a wide variety of Section 106 reviews with many different federal agencies gives us a valuable perspective in helping to address and resolve issues raised under Section 106. Therefore, we incorporate by reference our previous "consulting party" request, and ask MMS to grant the National Trust consulting party status for MMS' review of the Cape Wind Project.

B. NATIONAL ENVIRONMENTAL POLICY ACT.

In addition to the Section 106 process, MMS must meet the procedural requirements of NEPA.¹ NEPA requires MMS to consider the potential environmental impacts associated with

¹ The Section 106 regulations encourage agencies to coordinate the Section 106 process with other environmental processes such as NEPA. 36 C.F.R. §§ 800.3(b), 800.8. The regulations outline specific standards for developing environmental documents that comply with Section 106. *Id.* § 800.8(c). However, the procedural requirements of NEPA alone are not enough to satisfy the standards set forth in 36 C.F.R. § 800.8(c). Instead, the regulations require specific actions on the part of the agency, including seeking the participation of "consulting parties" as well as involving the public. *Id.* §§ 800.8(c)(1)(i),

the Cape Wind Project, and to evaluate alternatives to the project. *See* 42 U.S.C. § 4332(2)(C). Public participation is a critical aspect of the agency's decisionmaking process, and the agency must "encourage and facilitate public involvement." 40 C.F.R. §§ 1500.2(d), 1506.6(a). Scoping allows the public to raise significant issues and concerns that the agency should analyze. *Id.* § 1501.7(a).

The following paragraphs outline the broad issues and concerns the National Trust believes MMS must address in the context of this EIS:

- **Analyze a Reasonable Range of Alternatives.**

NEPA requires MMS to analyze a reasonable range of alternatives. 40 C.F.R. § 1502.14. The NEPA regulations describe the alternative requirement as the "heart of the environmental impact statement." *Id.* The purpose of the alternative requirement is to prevent the impact statement from becoming a "foreordained formality." *City of New York v. Dept. of Transportation*, 715 F.2d 732, 743 (2nd Cir. 1983). Whether an alternative is reasonable or not turns on whether it will accomplish the stated purpose for the project. *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001).

A reasonable range of alternatives for the Cape Wind Project should include not only a variation in the number of turbines within the proposed site, but alternative locations to the current proposed site that would be less harmful to the significant historic values within the Nantucket Sound, as well as a "no action" option. Alternatives that simply propose fewer turbines may not adequately address historic preservation concerns, and thus, may not be viewed as a sufficient "range of alternatives." Certainly, the purpose and need for the Project – to provide a renewable power source for New England and address new renewable energy supply issues – can be achieved by alternative means and locations, which MMS should "rigorously explore and objectively evaluate," 40 C.F.R. § 1502.14. The Corps' DEIS failed to provide a reasonable range of alternatives, and even failed to sufficiently explore the alternatives provided. *See* Corps' DEIS at 3-26 to 3-39, 3-99.² The National Trust urges MMS to explore in-depth alternative locations for the Cape Wind Project, especially alternatives that would be less harmful to historic properties.

800.8(c)(1)(iv). If MMS chooses to coordinate Section 106 with NEPA for the Cape Wind Project, MMS' environmental documents must clearly notify the public of its intention to do so, and must notify the ACHP and SHPO in advance, and must meet the standards outlined in the Section 106 regulations.

² The Corps identified four Alternatives for additional environmental review and comparison purposes. Two of the four Alternatives would use in whole or in part the Nantucket Sound. The initial analysis of historic properties affected recognized that the Nantucket Sound has the greatest number of affected properties.

- **Provide an Adequate Baseline of the Potentially Affected Historic Properties.**

MMS should provide baseline documentation about historic and cultural properties and their condition within the proposed area for the Cape Wind Project. NEPA requires the agency to “describe the environment of the area(s) to be affected or created by the alternative under consideration.” 40 C.F.R. § 1502.15. Establishing baseline conditions of the affected environment is an essential requirement of the NEPA process. *See Half Moon Bay Fisherman’s Marketing Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (“without establishing . . . baseline conditions . . . , there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA”). Only with adequate disclosure of information can the public comprehend, with sufficient particularity, the historic properties affected.

As discussed above, MMS should expand the scope of historic properties affected beyond the limited scope of the properties identified in the Corps’ DEIS and Section 106 analysis. The EIS should include all historic properties and districts listed on or eligible for the National Register, consistent with the Section 106 regulations, 36 C.F.R. § 800.16(l)(2). MMS should not follow the Army Corps’ approach of excluding historic properties that are eligible for the National Register but not formally determined eligible by the Keeper. Corps’ DEIS, Appendix 5.10-F at 19-20. Also, MMS should seek to ensure that archaeological resources, including resources with traditional religious and cultural significance to Indian tribes, are adequately identified in the EIS.

- **Take a “Hard Look” at the Direct, Indirect, and Cumulative Impacts to Historic Properties.**

MMS should take a “hard look” at the direct, indirect, and cumulative impacts of the proposed action on historic properties before taking action. 40 C.F.R. § 1508.25; *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1284 (1st Cir. 1996). The NEPA regulations define indirect impacts as those that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. . . .” 40 C.F.R. § 1508.8(b). Cumulative impacts are the compounding of an action on “other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.” *Id.* § 1508.7.

The National Trust urges MMS to look not only at the significance of the impacts already reported in the Corps’ DEIS, but to examine more closely the direct and indirect impacts of the proposed Cape Wind Project and compare those impacts with the broad alternatives. The Corps’ technical report in the DEIS makes clear that at least two NHLs, four historic districts, and 10 individual historic properties listed on or eligible for the National Register will be adversely affected. Corps’ DEIS, Appendix 5.10-F, at 42. However, the Corps’ DEIS does not provide specific information about the potential direct impacts of the project on submerged historic

cultural resources, and thus, MMS should focus on obtaining more specific information about the potential direct impacts of the project on those resources. *See* Corps' DEIS at 5-184-185, 5-199, 5-210 (identifies three potential submerged historic cultural resources, which could be avoided). Finally, MMS should discuss a broad range of cumulative impacts. It will be important for MMS to evaluate the collective impact of additional wind farm projects, which are reasonably foreseeable if this project is approved, on the many historic properties that derive historic value from the Nantucket Sound's setting.

- **Examine Measures to Mitigate the Potential Adverse Impacts to Historic Properties.**

Finally, MMS must examine ways to mitigate adverse impacts to the Nantucket Sounds' significant historic properties. NEPA requires MMS to "[i]nclude [in the EIS] appropriate mitigation measures not already included in the proposed action or alternatives." 40 C.F.R. § 1502.14. The analysis should include "a discussion of possible mitigation measures to avoid adverse environmental impacts . . . and must be reasonably complete in order to properly evaluate the severity of the adverse effects of a proposed project prior to making the final decision." *Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999) (internal citations omitted). "It is not enough to merely list possible mitigation measures." *Id.* Although the Corps recognized that visual impacts would alter the historic Nantucket Sound setting for the identified historic properties, the Corps' DEIS offered very few measures to mitigate those impacts. *See* Corps' DEIS at 5-210; Appendix 5.10-F, at 43-44. Therefore, MMS should examine in more detail how the visual and audible impacts of the proposed Cape Wind Project could be mitigated.

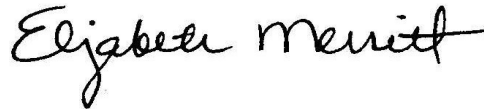
Conclusion

In light of the significant historic properties affected by the Cape Wind Project, including at least two National Historic Landmarks, MMS' compliance with Sections 106 and 110(f) of the NHPA and the requirements of NEPA are critical. The National Trust does support the need for and advancement of renewable energy technology. However, we caution against a solution to this problem that would irreparably alter, damage, or destroy aspects of our national heritage without serious consideration of alternatives and/or modifications. MMS should make every effort to understand the implications of the Cape Wind Project, and if necessary deny the applicant's 30-year lease request.

Dr. Rodney E. Cluck
Mineral Management Service, DOI
July 28, 2006
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We look forward to participating in both the Section 106 and NEPA processes. If you have any questions or comments, please feel free to contact me.

Respectfully submitted,

A handwritten signature in black ink, reading "Elizabeth Merritt". The signature is written in a cursive, flowing style.

Elizabeth Merritt
Deputy General Counsel

cc: Melanie Stright, Archeologist, Federal Preservation Officer,
Minerals Management Service
Maureen Bornholdt, Program Manager, Renewable Energy/Alternate Use,
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